Supreme Court, U.S.
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No. 98-1148

In The

Supreme Court of the United States

October Term, 1998

DENNIS CAMPBELL, SR., ET AL.,

Petitioners,

v.

BUTCH McALISTER,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit United States Court of Appeals properly applied the correct Fourth and Fourteenth Amendment analysis when reviewing an "excessive force" allegation against a school official based on the official's removal of the student from the class due to the child's disruptive behavior and insubordination.

LIST OF PARTIES

1. Dennis Campbell, Sr. and Tammy Campbell, as next friend of Dennis Campbell, Jr., Petitioners.

2. Butch McAlister, Respondent.

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STATEMENT OF THE CASE

Respondent directs the Court to the facts as accurately outlined in the opinion of the court of appeals, (Pet. App. 2a-4a), but Respondent adds the following.

Respondent McAlister removed Dennis Campbell from an elementary school classroom after Dennis became disruptive and uncontrollable. Dennis was upset because he thought his teacher had mistreated him early in the day. Dennis refused to do his work and threw a paper clip. His teacher, Kelly Hanse, informed Dennis that his actions resulted in the forfeiture of his play time. When Dennis continued to refuse to obey instructions given by Ms. Hanse, she requested the assistance of assistant principal Beverly Bollinger. Bollinger instructed Dennis to go to the principal's office. Dennis refused to do so and told Bollinger to "shut up."

Bollinger then requested McAlister, a Sugarland police officer assigned to teach at Dulles as a part of a nationwide drug prevention program known as D.A.R.E., to assist in removing Dennis from the classroom and to escort Dennis to the principal's office. McAlister was the only adult male in the building at the time.

Dennis resisted McAlister's requests to go with him to the principal's office. Dennis attempted to kick McAlister and lost his balance in the process, falling to the ground. McAlister then carried Dennis out of the classroom "with his feet off the floor" for the 10 to 15 feet it took to reach the hallway. Once outside the classroom, Dennis walked with McAlister to the principal's office, holding McAlister's hand.

Contrary to this version of events, Petitioners alleged that McAlister slammed Dennis to the ground with excessive force. However, as the lower courts noted, the evidence shows that Dennis suffered no physical or psychological injury as a result of this incident. It is undisputed that when Dennis fell to the floor he neither cried out nor whimpered, nor did he express any pain. Dennis' mother noted that when she picked Dennis up from the day care on February 28, 1994, he "did not have any scratches, torn clothing, and was not bleeding." Dennis' condition required no x-rays nor follow up medical examinations of any sort.

SUMMARY OF ARGUMENT

Petitioners fail to demonstrate that any conflict exists among the circuits, or between the Fifth Circuit's decision and this Court's jurisprudence. Therefore, granting the writ of certiorari is not warranted. The Fifth Circuit properly applied decisions of this Court in measuring a § 1983 civil rights claim within the context of the Fourth and Fourteenth Amendments. The appropriate application of the Fourth Amendment is correct as a matter of law because when examining "force" by an official against a student, the test is whether the official was acting reasonably under the totality of the circumstances, keeping in mind the special needs of the educational environment.

Also, the Fourteenth Amendment does not apply in this situation where substantial due process is provided by state law. Notwithstanding whether Respondent, a police officer, was acting as a law enforcement official (as

opposed to an educator) in removing a disruptive student from the classroom, there is no question that some amount of force was required to remove Dennis from the class and state law provides adequate remedial measures to the extent such force was excessive.

ARGUMENT

REASONS FOR DENYING THE WRIT

A. Rule 10 jurisdiction is not invoked.

Petitioners cite 28 U.S.C. § 1254(1) as their jurisdictional basis for review. Petitioners' challenge underscores the reasons for Supreme Court Rule 10, which states:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the course discretion, indicate the character of reasons this court considers:
>
> (a) a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter . . .
>
> (b) a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has been decided on an important federal question in a way that conflicts with relevant decisions of this court.

SUP.CT.R. 10.

Neither criteria is met here. In reality, the result in this case represents a legal determination of a fact specific inquiry which does not conflict with any other federal authority, from this Court or otherwise. For the reasons that follow, this Court's jurisdiction is not invoked under any prong of Rule 10. Therefore, the petition should be denied.

B. This case presents no question of federal law to be "settled," and no conflict exists between the Fifth Circuit's opinion and any other opinion of this Court, or any other circuit.

To prevail on a § 1983 civil rights claim, Petitioner must show that (1) he has asserted a violation of a constitutional right; (2) this right was clearly established at the time of the alleged wrongdoing; and (3) the Respondent's actions were objectively unreasonable. *Siegert v. Gilley*, 111 S.Ct. 1789, 1793 (1991). This Court has stated that "excessive force" claims brought under § 1983 are reviewed on a case-by-case basis. *Graham v. Conner*, 109 S.Ct. 1865, 1870 (1988). Additionally, if a constitutional claim is governed by a specific constitutional provision, that claim must be analyzed under the standard appropriate to that specific provision and not under the rubric of substantive due process. *United States v. Lanier*, 117 S.Ct. 1219, 1228 n.7 (1997). The lower courts properly used this Court's directives and reasoning to determine that the facts alleged by Petitioner did not constitute a violation of Dennis' Fourth and Fourteenth Amendment rights.

Unfortunately, the characterization of Petitioners' questions fails to address the justiciable issues upon which the suit was actually based. This Court has made clear that the schoolhouse presents different constitutional constructs for the Fourth and Fourteenth Amendments than do other situations in which these amendments may apply.

Further, Petitioners fail to demonstrate any conflict of authority among the circuits. The Fifth Circuit noted, and Petitioners emphasize here, that this Court has not ruled on the specific issue of excessive force by public school officials against students. However, the instant case does not present appropriate circumstances to decide that issue. No matter whether the Fourth or Fourteenth Amendment is considered as the constitutional foundation for Petitioners' claim, the facts as alleged by Petitioners do not establish a violation under either standard.

1. McAlister engaged Dennis not as a police officer but as an educator.

Petitioners disingenuously present their two questions as excessive force by a police officer. Such allegations raise serious fears in society regarding the abuse of power. McAlister was not in the school acting as a police officer. Rather, he was present in the school in the position of an educator.

It is undisputed that McAlister was a teacher in the school rather than a police officer investigating a crime or responding to a call. It is undisputed that McAlister was in the school to teach, and that he obtained a certification for that purpose. It is undisputed that McAlister was

asked to escort Dennis to the principal's office, not because he was a police officer, but rather because he was the only male school official in the building when the need for assistance with a recalcitrant student arose. Therefore, the appropriate standard to apply to McAlister's actions is the standard for that of a school teacher or an administrator responding to a student's behavior rather than a police officer. Case law generally affords educators more constitutional latitude in the classroom than that allowed in the context of an ordinary police search or seizure. *See New Jersey v. T.L.O.*, 105 S.Ct. 733 (1985).

In any event, the outcome of this case is not dependent on whether McAlister is characterized as an educator or a police officer. This is because, in either circumstance, his conduct is judged by an objective reasonableness standard. Even if the Court assumes McAlister was acting as a policeman, he is still entitled to qualified immunity, as the trial court and court of appeals concluded, because his use of force (if any force was used at all) was clearly reasonable under the circumstances.

2. The Fourth Amendment is not implicated in this instance because Respondent acted reasonably under the totality of the circumstances.

The Fourth Amendment analysis requires measurement of the force used in the context of the totality of the circumstances to determine if it gives rise to an unreasonable seizure. Dennis' seizure (assuming Petitioners' allegations as true) was not unreasonable under the totality

of the circumstances and, as such, does not rise to a violation under the Fourth Amendment. Petitioners' second question presented, which qualifies the use of force solely to prevent violence, is a misnomer. Petitioners wrongly suggest that force must only be used upon a student to subdue some violent or criminal intentions. The interest this Court sought to protect in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), was not to stop violence *per se* but rather "[maintain] discipline in the classroom and on school grounds." *Id.* at 339. This Court has also noted that the educational environment is different when examining the Fourth Amendment because of the school's "custodial and tutelary responsibilities for the children." *Veronia Sch. Dist. 47J v. Action*, 515 U.S. 646, 656 (1995). Fifth Circuit authority is consistent in that it has held that school officials are subject to the Fourth Amendment, and the standard of reasonableness is to be determined by the totality of the circumstances.[1] *See Hassan v. Lubbock Ind. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir.1995), *cert. denied*, 116 S.Ct. 532 (1995).

An examination of the facts, taken in a light most favorable to Petitioners, shows that the force used to remove Dennis from the classroom was based on his

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[1] Petitioners disagree with the Fifth Circuit's position. In an attempt to show a conflict, they cite *P.B. v. Koch*, 96 F.3d 1298 (9th Cir. 1996). *Koch* is easily distinguished in that the Ninth Circuit found the defendant educator unreasonable in his actions. The violence the defendant inflicted on the students in that case dealt with incidents which took place outside the ambient of the educational environment. *See T.L.O.*, 469 U.S. at 339.

recalcitrance and his object misbehavior. This misbehavior was undisputedly a disruption to the classroom and therefore disturbed the learning environment of his fellow students. Under these circumstances, Dennis' removal, by some moderate amount of force, cannot be viewed as unreasonable. The lack of any injury to Dennis proves that no unreasonable force was used, even if McAlister "slammed" Dennis to the ground.[2]

To suggest, as Petitioners do, that McAlister was only reasonable in removing Dennis with force if he feared that Dennis had a gun, was using drugs, or was intent on committing a violent crime does violence to the long-held principles of this Court that, to maintain order and a learning environment in schools, educators require a certain amount of flexibility. *T.L.O.*, 469 U.S. at 340. This Court has also made clear that the education of children is the role and responsibility of parents, teachers, and state and local officials, not federal judges. *Hazelwood Sch. Dist. v. Kuhlmeir*, 484 U.S. 260, 263 (1988). It would be unwise for this Court to interject general, bright line restraints on classroom discipline by classifying specific correctional measures by educators as violations of certain constitutional rights. Rather, the current law of

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[2] Respondent is not suggesting that a particular, significant injury is required to state a claim, a position this Court has rejected in a related context. *Hudson v. McMillian*, 503 U.S. 1 (1992) (holding that a showing of serious injury not required to prove violation of cruel and unusual punishment clause). Rather, in the instant case, the absence of any bruising, bleeding, or need for medical care clearly shows that, if Dennis was "slammed" to the floor, it could not have been with unreasonable force.

allowing for a reasonability test on a case-by-case basis is the proper course to maintain this Court's long-held belief that schools are a place for learning.

3. The Fourteenth Amendment does not apply in this situation where substantial due process is provided for by state law.

The first question, as framed by Petitioners, asks whether students are protected by the Fourth and Fourteenth Amendments from excessive force even though "the student does not manifest outward, physical proof of injury." The question as presented would be, and in effect was, answered by the Fifth Circuit in the affirmative. The Fifth Circuit properly held that students do have substantive due process protections from excessive force and their bodily integrity is protected under the Fourteenth Amendment.[3]

The Fifth Circuit has clearly stated that a student is to be free from arbitrary, capricious, and excessive punishment "wholly unrelated to the legitimate goal of maintaining an atmosphere conducive to learning." *Fee v.*

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[3] This is true in many other circuits where courts have analyzed excessive force claims against students by teachers and administrators under the Fourteenth Amendment substantive due process clause. *Wise v. Pearidge Sch. Dist.*, 855 F.2d 560, 565 (8th Cir. 1988); *Metzger v. Osbek*, 841 F.2d 518 (3d Cir. 1988); *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987); *Garcia v. Miera*, 817 F.2d 1151, 1158 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988); *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980); *Jones v. Witinski*, 931 F.Supp. 364 (M.D.Pa. 1996).

Herndon, 900 F.2d 904, 808 (5th Cir.), *cert. denied*, 498 U.S. 908 (1990).

However, the Fifth Circuit has also held that if a state provides adequate post-punishment criminal or civil remedies for the alleged mistreatment of the student by the educator, the state, by so doing, does not act arbitrarily. *Fee*, 900 F.2d at 808; *Woodward v. Los Frenos Sch. Dist.*, 732 F.2d 1243, 1246 (5th Cir. 1984); *Coleman v. Franklin Parrish Sch. Board*, 702 F.2d 74, 75-76 (5th Cir. 1983) (per curiam). Furthermore, any injury received by a student due to corporal punishment,[4] regardless of the severity of the injury or the sensitivity of the child, fails to give rise to the Fourteenth Amendment's due process clause if adequate state remedies exist. *Fee*, 900 F.2d at 808; *Cuttingham v. Beavers*, 858 F.2d 269 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989). Texas provides post-punishment remedies for the student, a matter Petitioners do not dispute. Therefore, no Fourteenth Amendment violation occurred in this instance, and the claim fails as a matter of law.[5]

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[4] To be sure, this is not a case of corporal punishment, but corporal punishment is the most analogous analytical framework because the claim arose out of disciplinary procedures.

[5] Looking again to *Lanier*, the only measure of Dennis' alleged civil rights violation is under the Fourth Amendment's reasonableness test or the Fourteenth Amendment's substantive due process protection. Petitioners argue that to look at reasonableness, one must examine the physical and emotional harm Dennis allegedly suffered. However, that is not a proper inquiry. Rather, these are issues of damages, which are determined according to common law tort principles, not constitutional constructs. *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986). Thus, Petitioners seek to move this Court far beyond the traditional reasonableness test.

CONCLUSION

In summary, the Court of Appeals properly applied the constitutional standards of an educator in a school and found that McAlister acted reasonably under the totality of the circumstances in order to maintain discipline in the classroom setting. And despite the force exacted upon Dennis, he has substantive due process rights under Texas law. Petitioners have shown no circuit conflict for this Court to address.

For all these reasons, this Honorable Court should deny the petition for writ of certiorari.

Respectfully submitted,

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